

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN TACOMA

4 CHAO CHEN, )  
5 Plaintiff, ) No. CV17-5769RJB  
6 v. )  
7 THE GEO GROUP, )  
8 Defendant. )  
9 and )  
10 STATE OF WASHINGTON, )  
11 Plaintiff, )  
12 v. )  
13 THE GEO GROUP, INC., )  
14 Defendants. )

## MOTION HEARING

August 2, 2018

BEFORE THE HONORABLE ROBERT J. BRYAN  
UNITED STATES DISTRICT COURT JUDGE

1  
**APPEARANCES:**2  
**For the Plaintiff:**3  
**Andrew Free**  
LAW OFFICE OF R. ANDREW FREE  
4  
**Adam J Berger**  
**Jamal Whitehead**  
5  
**SCHROETER GOLDMARK & BENDER**6  
**For the Defendants:**7  
**Mark Emery**  
NORTON ROSE FULBRIGHT  
8  
**Joan Mell**  
**III BRANCHES LAW**9  
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09:28:53AM 1 MS. MELL: Good morning, your Honor.

09:28:56AM 2 THE COURT: This is further in Nwauzor versus

09:29:04AM 3 GEO, No. 17-5769, and comes on for oral argument on three

09:29:09AM 4 pending motions.

09:29:14AM 5 Ms. Mell and Mr. Emery are here for the defendants.

09:29:18AM 6 Let's see, Mr. Free, Mr. Whitehead, and Mr. Berger are

09:29:26AM 7 here for plaintiffs.

09:29:28AM 8 A couple of housekeeping matters first. Mr. Chen was

09:29:40AM 9 dismissed as a plaintiff in the case. He is still on the

09:29:45AM 10 record as a defendant in the counterclaim. Is that

09:29:54AM 11 intentional or should he be dismissed from the case?

09:29:59AM 12 MS. MELL: Your Honor, GEO's position --

09:30:02AM 13 THE COURT: Wait a minute. You need to speak

09:30:04AM 14 right into the mic.

09:30:06AM 15 MS. MELL: GEO's position is that Mr. Chen should

09:30:10AM 16 remain as a counterdefendant.

09:30:13AM 17 THE COURT: Okay. That's not the subject of

09:30:20AM 18 today's issues, I just wanted to raise the issue because

09:30:25AM 19 it wasn't clear to staff.

09:30:27AM 20 There have been a couple of late matters filed,

09:30:41AM 21 including a letter from ICE, and then the other one a

09:30:49AM 22 declaration from a Tae Johnson, the last being filed just

09:31:00AM 23 this morning. Have those things been served on counsel?

09:31:07AM 24 Do you have those?

09:31:11AM 25 MR. FREE: We do, your Honor.

09:31:14AM 1                   THE COURT: I have read -- I had the week off  
09:31:20AM 2 last week, almost. I spent part of that week sitting on a  
09:31:26AM 3 deck out on Hood Canal reading stuff, including everything  
09:31:34AM 4 filed on these three motions. And then I have reviewed  
09:31:43AM 5 since then a good deal of what is in the files. That's a  
09:31:50AM 6 lot of reading. This case is way too paper heavy at this  
09:32:03AM 7 point.

09:32:05AM 8                   Be that as it may, I have read a lot. We have  
09:32:10AM 9 discussed it and worked on it in chambers, as well. I set  
09:32:16AM 10 this oral argument to give you the opportunity to tell me  
09:32:21AM 11 whatever you think is appropriate to say or to argue on  
09:32:29AM 12 the issues raised by these three motions. I would ask  
09:32:35AM 13 that you limit your comments to 20 minutes a side.

09:32:47AM 14                   In the order of filing, the plaintiffs' motions are  
09:32:55AM 15 older than the defendants' motion for class certification,  
09:33:01AM 16 so I assume you go first.

09:33:23AM 17                   MR. WHITEHEAD: Yes, your Honor. I am sorry.  
09:33:26AM 18 I'm unclear as to the order.

09:33:29AM 19                   THE COURT: You need to speak into the mic. You  
09:33:32AM 20 will break your back if you lean over. Just remain seated  
09:33:36AM 21 and tell me what's on your mind.

09:33:38AM 22                   MR. WHITEHEAD: I just want to make sure that I  
09:33:39AM 23 am clear as to the order. Are you asking for plaintiffs  
09:33:42AM 24 to argue their class certification motion?

09:33:44AM 25                   THE COURT: They made the motion first. They can

09:33:49AM 1       argue -- They're all three motions. Anybody can argue  
09:33:56AM 2       within the time limits whatever you want to argue about  
09:33:58AM 3       those three motions. I am mindful that plaintiffs' motion  
09:34:05AM 4       and the defendants' motion regarding class certification  
09:34:09AM 5       are on the same subject.

09:34:11AM 6            MR. WHITEHEAD: Then, your Honor, we will go  
09:34:13AM 7        first.

09:34:14AM 8            MS. MELL: No. He said --

09:34:15AM 9            THE COURT: You won't go first, because they  
09:34:18AM 10        filed first, the motion to deny class certification.

09:34:23AM 11            MR. WHITEHEAD: All right. Thank you, your  
09:34:25AM 12        Honor.

09:34:26AM 13            MR. EMERY: Good morning, your Honor. My name is  
09:34:29AM 14        Mark Emery of the GEO Group. I would ask if the court  
09:34:37AM 15        would reserve five minutes for rebuttal.

09:34:39AM 16            THE COURT: The time is yours. Keep track of it  
09:34:41AM 17        yourself.

09:34:42AM 18            MR. EMERY: Your Honor, this is the first  
09:34:44AM 19        opportunity I have had to speak with you on these cases.  
09:34:47AM 20        I am counsel for the GEO Group in all of the detainee work  
09:34:53AM 21        cases that are currently pending right now, in Colorado,  
09:34:56AM 22        both the cases before your Honor, and in California, as  
09:34:58AM 23        well. So I am very aware of the importance of the issues  
09:35:01AM 24        that are sitting before the court today, and the fact that  
09:35:04AM 25        we put a lot of paper in front of you.

09:35:07AM 1       The issues I would like to cover are, first of all,  
09:35:13AM 2       the immunity issue, Yearsley immunity. I will probably  
09:35:18AM 3       spend most of my time on that.

09:35:20AM 4       I would like to say a few things further about the  
09:35:23AM 5       issue of employment, the nature of the employment in  
09:35:24AM 6       question. I will say I have reviewed the past hearing  
09:35:29AM 7       transcripts and read very carefully your Honor's questions  
09:35:32AM 8       that you put forward.

09:35:33AM 9       And I also recognize the importance of the class  
09:35:35AM 10       certification issue, because you are the first court to  
09:35:38AM 11       consider whether a minimum wage claim would be certified  
09:35:41AM 12       for a class. The Menocal case is older, but that, in  
09:35:47AM 13       fact, was dismissed in that case.

09:35:47AM 14       To begin with the Yearsley immunity: The federal  
09:35:54AM 15       government delegates authority to contractors to carry out  
09:35:57AM 16       a number of its different missions, including federal  
09:36:01AM 17       immigration detention. The Yearsley doctrine provides  
09:36:07AM 18       that when the government authorizes a contractor to take  
09:36:11AM 19       certain actions, it directs the contractor, and that  
09:36:14AM 20       authorization is valid, the contractor is entitled to  
09:36:20AM 21       immunity.

09:36:21AM 22       What we are talking about here is the Voluntary Work  
09:36:24AM 23       Program. What is distinctive about this case is that the  
09:36:29AM 24       only claim is a minimum wage claim. The plaintiffs are  
09:36:34AM 25       essentially alleging that we are liable under the

09:36:39AM 1       **Washington Minimum Wage Act for doing exactly what the**  
09:36:43AM 2       **government has told us to do.**

09:36:45AM 3       **Now, I want to get into the details of that**  
09:36:48AM 4       **authorization and try to make it as clear to you as I can**  
09:36:53AM 5       **why we think we have that authorization and are cloaked in**  
09:36:58AM 6       **immunity.**

09:36:58AM 7       **One sort of very preliminary remark: When you read**  
09:37:01AM 8       **the nature of the pleadings in this case and the**  
09:37:03AM 9       **arguments, the plaintiffs have gone forward as if they are**  
09:37:07AM 10       **sort of exposing some deep secret that GEO has at the**  
09:37:13AM 11       **Northwest Detention Center, in the way it runs its**  
09:37:17AM 12       **program, the truth could not be further apart.**

09:37:20AM 13       **What we do is straight up according to the policies**  
09:37:26AM 14       **that ICE put forward in the terms of our contract. We**  
09:37:29AM 15       **operate the Voluntary Work Program in broad daylight. I**  
09:37:36AM 16       **would like to begin with a brief discussion of those**  
09:37:38AM 17       **standards.**

09:37:39AM 18       **If you don't mind, I will put a couple of things up.**  
09:37:42AM 19       **These are all materials that are in the record. So we**  
09:37:50AM 20       **begin with Section 5.8 of the Voluntary Work Program.**  
09:37:54AM 21       **This is from ICE's national standards.**

09:37:56AM 22       **The first thing I would point to here is No. 1, where**  
09:37:59AM 23       **it outlines three different kinds of facilities. ICE**  
09:38:02AM 24       **operates three different kinds of facilities: An SPC,**  
09:38:06AM 25       **which ICE runs directly, and two different kinds of**

09:38:09AM 1 contract facilities, CDFs and IGSA. The one that is at  
09:38:13AM 2 issue is a CDF. The same policies apply at all of these  
09:38:19AM 3 different facilities.

09:38:20AM 4 Second, if you look down at 5.8(1)(b) here, you see  
09:38:24AM 5 that this is listed as an expected outcome. Number one,  
09:38:30AM 6 "Detainees may have opportunities to work," and so on, as  
09:38:37AM 7 described here, within the constraints of what we are  
09:38:39AM 8 doing at a detention facility.

09:38:42AM 9 Flipping over to Section 5(a), again, this is  
09:38:47AM 10 mandatory language, "Detainees shall be provided the  
09:38:51AM 11 opportunity to participate in a Voluntary Work Program."

09:38:57AM 12 Now we move to the relevant portions of the contract.  
09:39:07AM 13 This is from Page 82 of the contract. We see that one of  
09:39:12AM 14 the directives that ICE gives to GEO is to manage --

09:39:16AM 15 THE COURT: Can you erase those arrows that are  
09:39:19AM 16 not --

09:39:22AM 17 MR. EMERY: How do I do that? That is  
09:39:26AM 18 distracting. Thank you.

09:39:27AM 19 And I thought it might be worthwhile, very quickly,  
09:39:32AM 20 just looking at the particular language of this case. So  
09:39:34AM 21 the first sentence, "Detainee labor shall be used in  
09:39:38AM 22 accordance with the detainee work plan developed by the  
09:39:42AM 23 contractor, and will adhere" --

09:39:43AM 24 THE COURT: Just a minute. You are getting ahead  
09:39:45AM 25 of me here. I don't know where you are looking at,

09:39:49AM 1       Page 82. I have a copy of the contract here. All right.

09:39:58AM 2       MR. EMERY: This is Page 82 of the contract.

09:40:03AM 3       "Detainee labor shall be used in accordance with the

09:40:06AM 4       detainee work plan developed by the contractor, and in

09:40:09AM 5       accordance with the ICE PBNDS on the Voluntary Work

09:40:14AM 6       Program," which we just looked at.

09:40:16AM 7       So we are not hiding anything here. ICE tells us

09:40:19AM 8       that detainee labor shall be used. It shall be used in

09:40:23AM 9       accordance with its standards.

09:40:25AM 10       Continuing on, "The detainee work plan must be

09:40:28AM 11       voluntary, and may include work or program arrangements

09:40:32AM 12       for industrial, maintenance, custodial, service, or other

09:40:36AM 13       jobs."

09:40:38AM 14       What I would emphasize there is, we are not just

09:40:41AM 15       talking about detainees cleaning their cells, we are

09:40:46AM 16       talking about a wide range of things that ICE has directed

09:40:49AM 17       us to have detainees do.

09:40:52AM 18       Further, "The detainee work program shall not

09:40:55AM 19       conflict with other requirements of the contract, and must

09:40:57AM 20       comply with all applicable laws and regulations."

09:41:02AM 21       We understand that one of the allegations that the

09:41:06AM 22       plaintiffs make in this case is that this phrase somehow

09:41:09AM 23       encompasses the minimum wage law -- Minimum Wage Act.

09:41:18AM 24       This phrase needs to be read in the context of the

09:41:20AM 25       contract itself. One really need look no further than the

09:41:24AM 1       **very next sentence to understand why detainees aren't**  
09:41:29AM 2       **GEO's employees.**

09:41:30AM 3       **The next paragraph begins, "Detainees will not be**  
09:41:34AM 4       **used to perform the responsibilities or duties of an**  
09:41:37AM 5       **employer" -- "of the contractor." So the contract**  
09:41:39AM 6       **especially distinguishes between what detainees do, which**  
09:41:45AM 7       **can be a number of different jobs at the facility, and**  
09:41:47AM 8       **what employees do.**

09:41:48AM 9       **So moving on to the pay term, which I know is a key**  
09:41:52AM 10       **issue that is in dispute here. Going back to the PBNDS,**  
09:41:58AM 11       **I'm sure you are familiar with the language by now,**  
09:42:01AM 12       **Subsection K of 5.8 states, "Compensation is at least \$1**  
09:42:07AM 13       **U.S. per day. The facility shall have an established**  
09:42:10AM 14       **system that ensures the detainees receive the pay owed**  
09:42:14AM 15       **them before being transferred or released."**

09:42:17AM 16       **The authorization that ICE gives us is to pay at**  
09:42:19AM 17       **least \$1 a day. We pay \$1 a day. This is the exact same**  
09:42:25AM 18       **rate ICE pays at its own facility. This is the same rate**  
09:42:28AM 19       **that's paid in all of the facilities, unless there is some**  
09:42:32AM 20       **other arrangement made.**

09:42:33AM 21       **You will notice, too, the second sentence here, "The**  
09:42:36AM 22       **facility shall have an established system that ensures**  
09:42:39AM 23       **detainees receive the pay owed them before being**  
09:42:41AM 24       **transferred or released." An important point that I hope**  
09:42:45AM 25       **has come out in the briefing, and should come out in the**

09:42:47AM 1 declarations filed today, and other declarations we filed,  
09:42:53AM 2 Mr. Kimble's in particular, is that GEO doesn't pay -- GEO  
09:42:59AM 3 doesn't decide what to pay detainees.

09:43:01AM 4 THE COURT: They decided \$1 a day in their  
09:43:06AM 5 worker's handbook.

09:43:07AM 6 MR. EMERY: Your Honor, ICE decides that it's \$1  
09:43:10AM 7 a day, and we administer that.

09:43:13AM 8 THE COURT: Where does ICE say \$1 a day rather  
09:43:19AM 9 than not less than \$1 a day?

09:43:23AM 10 MR. EMERY: We can look to another portion of the  
09:43:25AM 11 contract here. Looking at the highlighted portion, this  
09:43:35AM 12 is included in the same contract, "Detainee wages for the  
09:43:39AM 13 detainee work program, reimbursement for this line item  
09:43:42AM 14 via the actual cost of \$1 per day per detainee.  
09:43:46AM 15 Contractor shall not exceed the amount shown without prior  
09:43:49AM 16 approval by the contracting officer."

09:43:53AM 17 You can see that there are amounts put there. The  
09:43:55AM 18 rate --

09:43:56AM 19 THE COURT: That's what you get reimbursed for.  
09:44:00AM 20 How does that limit the pay?

09:44:03AM 21 MR. EMERY: That's the amount that ICE pays to  
09:44:05AM 22 detainees. GEO's role in the payment --

09:44:10AM 23 THE COURT: You pay more than that in some  
09:44:14AM 24 facilities, I understand.

09:44:17AM 25 MR. EMERY: I will address that in a moment. I

09:44:20AM 1 want to be clear what this provision says, which is that  
09:44:24AM 2 ICE pays \$1 to detainees.

09:44:27AM 3 The term "reimbursement rate" may be a little bit  
09:44:30AM 4 confusing. It is not a matter of ICE deciding to  
09:44:35AM 5 reimburse and GEO being able to pay whatever it wants.  
09:44:39AM 6 There is a rate that is set. There is an amount that can  
09:44:43AM 7 be paid per year. That is the total amount, \$114,975.  
09:44:48AM 8 This is what ICE has said, "GEO, you will pay this in a  
09:44:52AM 9 year." So essentially a dollar a day, 114,000 of them.  
09:44:58AM 10 This is providing 114,900 some daily opportunities --

09:45:03AM 11 THE COURT: What is to prevent you from deciding  
09:45:06AM 12 the rate is going to be \$2 per day?

09:45:08AM 13 MR. EMERY: Per this exact provision, we have to  
09:45:10AM 14 seek ICE's approval on that.

09:45:13AM 15 THE COURT: Why?

09:45:14AM 16 MR. EMERY: Because it says we shall not exceed  
09:45:17AM 17 the amount without the approval of the contracting  
09:45:19AM 18 officer. And there are clear --

09:45:24AM 19 THE COURT: Isn't that relative to reimbursement  
09:45:31AM 20 rather than what you pay detainees?

09:45:40AM 21 MR. EMERY: I really encourage you to not get  
09:45:43AM 22 hung up on the idea of reimbursement. This is ICE paying.  
09:45:46AM 23 GEO does not pay the detainees. ICE pays the detainees.  
09:45:51AM 24 We facilitate the payment.

09:45:52AM 25 THE COURT: I am curious about that. GEO set the

09:46:03AM 1       \$1 a day in the employee handbook. I guess I fail to see  
09:46:19AM 2 why GEO can't pay more if they choose to out of the  
09:46:24AM 3 goodness of their heart.

09:46:27AM 4                   MR. EMERY: This is why, your Honor: GEO's  
09:46:30AM 5 handbook notes a dollar a day, but GEO doesn't set that  
09:46:34AM 6 rate. ICE sets that rate. For example, when detainees  
09:46:37AM 7 enter the facility they are given a detainee handbook.  
09:46:40AM 8 That detainee handbook, the one in 2014, when this class  
09:46:44AM 9 action began, said, "Pay will be \$1 per day." That is ICE  
09:46:49AM 10 telling every detainee in every facility, whether run by  
09:46:53AM 11 ICE or run by us, that pay will be \$1 per day. This is  
09:46:56AM 12 the rate that ICE sets.

09:46:58AM 13                   As for why GEO wouldn't pay -- couldn't pay more, the  
09:47:02AM 14 contract says we shall not exceed that amount without  
09:47:05AM 15 ICE's approval.

09:47:07AM 16                   There are clear reasons why ICE would want that to  
09:47:09AM 17 happen. Your Honor, we are in a long-term contracting  
09:47:14AM 18 relationship with ICE. Every dollar that comes from ICE  
09:47:17AM 19 appropriations to detainees comes from U.S. taxpayers.  
09:47:21AM 20 The government has an interest in knowing what's expended  
09:47:25AM 21 on this. It sets limits on it. It is not going to allow  
09:47:28AM 22 GEO to go pay higher rates.

09:47:31AM 23                   Now, you will find in the declaration that was filed  
09:47:34AM 24 this morning --

09:47:35AM 25                   THE COURT: Wait a minute. Why would the

09:47:40AM 1 government not allow you to pay a higher rate? They won't  
09:47:44AM 2 reimburse you for a higher rate, but why would they say  
09:47:47AM 3 you can't pay a higher rate?

09:47:50AM 4 MR. EMERY: Look through this contract, the  
09:47:54AM 5 government controls every aspect of what we do at the  
09:47:56AM 6 facility. I mean, look at the line item -- You see the  
09:48:02AM 7 line item here on the top: "Estimating travel costs,  
09:48:07AM 8 including lodging and meals." You will see it has the  
09:48:10AM 9 exact same language in there. You might use the same  
09:48:13AM 10 logic, "Oh, why would the government care how much we  
09:48:16AM 11 spend on lodging and meals?" But that exact same language  
09:48:19AM 12 is in there. The amount that is allocated for it under  
09:48:22AM 13 the contract shall not be exceeded without ICE's approval.  
09:48:28AM 14 ICE wants to control these costs. ICE has an interest in  
09:48:32AM 15 controlling these costs.

09:48:35AM 16 You will see in the declaration that was filed this  
09:48:40AM 17 morning, which comes directly from ICE, in Paragraph 24,  
09:48:46AM 18 explains those provisions, "The NWC contract sets the  
09:48:51AM 19 quantity of \$1 reimbursements at 114,975 per option year.  
09:48:54AM 20 GEO shall not exceed that quantity without prior approval  
09:48:58AM 21 by the contracting officer. This approval can be sought  
09:49:01AM 22 by GEO and would be memorialized through a bilateral  
09:49:05AM 23 contract modification."

09:49:06AM 24 So the rate could be raised. If ICE decides that  
09:49:12AM 25 U.S. taxpayers want to pay \$11 to detainees an hour, it

09:49:16AM 1 will pass through that amount to detainees, we'll make  
09:49:19AM 2 sure they get paid that amount, and we go on. But it is  
09:49:23AM 3 ICE that funds everything that happens at the detention  
09:49:26AM 4 facility. We are a contractor.

09:49:30AM 5 That brings us back to the immunity point. We do all  
09:49:34AM 6 of this within the scope of our authorization. If we  
09:49:37AM 7 started paying a different amount, it actually would be  
09:49:40AM 8 going in a different direction from our authorization. It  
09:49:43AM 9 is in our interest to do what ICE directs us to do, which  
09:49:46AM 10 ultimately is in conformity with what Congress has  
09:49:51AM 11 directed.

09:49:51AM 12 That's the second part of the Yearsley test, whether  
09:49:54AM 13 this authorization to run the VWP at the dollar per day  
09:49:59AM 14 rate is validly authorized.

09:50:01AM 15 We have given you the text of this. The statute  
09:50:04AM 16 bears close care, 1855(d). It is an old statute, but it  
09:50:09AM 17 contains all of the language that is necessary to continue  
09:50:11AM 18 to direct -- or to infallibly confer authority on ICE to  
09:50:17AM 19 have us run the VWP at a dollar per day. It allocates  
09:50:23AM 20 money from here and for after.

09:50:24AM 21 It says Congress may from time to time set a rate,  
09:50:27AM 22 which it has done in different years. It seems to be an  
09:50:31AM 23 item that was sort of stuck in the budget for a long time.  
09:50:34AM 24 It no longer does.

09:50:35AM 25 Again, the declaration from ICE that we filed today,

09:50:38AM 1 particularly Paragraph 13, explains that Congress set this  
09:50:42AM 2 rate, and that's what their rate continues to be. "Per  
09:50:46AM 3 the terms of the contract, as well as authority provided  
09:50:48AM 4 above, reimbursement for the Voluntary Work Program is \$1  
09:50:53AM 5 per day per detainee."

09:50:54AM 6 The last point I want to make on the Yearsley  
09:51:02AM 7 immunity is, by asking whether GEO can pay more on its  
09:51:10AM 8 own -- this is really missing the point of what's  
09:51:13AM 9 happening here, that this is the administration of a  
09:51:17AM 10 government program. The government sets what terms the  
09:51:21AM 11 U.S. taxpayers will pay for this.

09:51:23AM 12 Paragraph 19 of the declaration filed today says it  
09:51:26AM 13 as clearly as can be said: "NWAC has implemented and  
09:51:31AM 14 conforms to the current PBNDS. PBNDS requires that  
09:51:36AM 15 detainees receive at least \$1 per day for work performed  
09:51:40AM 16 in the VWP." That is exactly what we do. So we act  
09:51:43AM 17 within the government's authorization, and therefore we  
09:51:46AM 18 are entitled to immunity.

09:51:50AM 19 If your Honor has no other questions on immunity, I  
09:51:53AM 20 will move to other issues.

09:51:54AM 21 THE COURT: Okay. Thank you.

09:51:58AM 22 MR. EMERY: A second point --

09:51:59AM 23 THE COURT: If you wanted to save some time --  
09:52:05AM 24 Use your time as you choose, I guess.

09:52:13AM 25 MR. EMERY: As I said, your Honor, I did want to

09:52:21AM 1 touch on some of the broader issues of employment class  
09:52:24AM 2 certification, but I imagine these are things I can  
09:52:28AM 3 address later.

09:52:59AM 4 MR. FREE: Good morning, your Honor. My name is  
09:53:09AM 5 Andrew Free, and I am appearing on behalf of the  
09:53:12AM 6 plaintiffs in this case, along with my co-counsel Jamal  
09:53:15AM 7 Whitehead. And Adam Berger is here with us, as well. I  
09:53:19AM 8 am going to address Yearsley immunity, and Mr. Whitehead  
09:53:23AM 9 will address the class certification questions in this  
09:53:25AM 10 case that are before the court.

09:53:26AM 11 I will pick up with the court's question, which I  
09:53:30AM 12 think is the critical one, and that is the difference  
09:53:34AM 13 between a reimbursement rate that is set by the federal  
09:53:37AM 14 government about how much ICE will pay GEO back for the  
09:53:41AM 15 work that is performed by detained immigrants, and a pay  
09:53:44AM 16 rate, which is what GEO is saying ICE has authorized it to  
09:53:48AM 17 set. So it is the difference between the floor to the  
09:53:51AM 18 ceiling.

09:53:51AM 19 We have Docket No. 101-1, 101-2, and 101-3, a  
09:53:59AM 20 judicial admission that GEO can and does pay more than a  
09:54:02AM 21 dollar at other facilities that it operates with contracts  
09:54:05AM 22 with ICE. We've got examples of the invoices that GEO  
09:54:09AM 23 sends to ICE documenting the reimbursement rate that ICE  
09:54:14AM 24 will pay for, and the GEO billable rate that GEO pays when  
09:54:18AM 25 it needs to have a higher rate in order to get detainees

09:54:21AM 1 to do the jobs so that it can function. And we've got an  
09:54:24AM 2 example of a page from a GEO detainee manual at another  
09:54:28AM 3 one of its facilities.

09:54:29AM 4 The reason we filed those things is because the  
09:54:31AM 5 statements that have been made in briefing about a uniform  
09:54:34AM 6 national policy of only paying detainees \$1 a day are not  
09:54:38AM 7 factually accurate. Those statements are not true. There  
09:54:40AM 8 are dozens of facilities in this country, including at  
09:54:43AM 9 least three that I know of that are run by GEO, in which  
09:54:46AM 10 the contractor pays more, and the government approves it.

09:54:49AM 11 And that's as it should be. Because according to the  
09:54:52AM 12 declaration submitted by ICE today, this morning, that was  
09:54:55AM 13 received by GEO last night at 4:45 -- 4:42, GEO is  
09:55:00AM 14 responsible for designing and implementing the  
09:55:04AM 15 performance-based requirements, including the  
09:55:08AM 16 work program. That is in the contract language, at  
09:55:11AM 17 Page 82, that my friend pointed out to the court.

09:55:15AM 18 Throughout this declaration Mr. Johnson makes clear  
09:55:19AM 19 that the contractor is required for coming up with the  
09:55:25AM 20 work plan and determining how it is going to be run.

09:55:29AM 21 I can point the court to the paragraphs. I have only  
09:55:32AM 22 had a little bit of time to review it. It says  
09:55:35AM 23 explicitly, "Performance-based contracts do not designate  
09:55:38AM 24 how a contractor is to perform the work, but rather  
09:55:42AM 25 establishes the expected outcomes and results that the

09:55:45AM 1 government expects." That's Paragraph 8.

09:55:48AM 2 Throughout this declaration, at Paragraph 9, at  
09:55:52AM 3 Paragraph 12, and Paragraph 13, the language is that of  
09:55:59AM 4 reimbursement. The answer to the question, "Why does it  
09:56:09AM 5 say a dollar as the reimbursement rate," is because it is  
09:56:13AM 6 the reimbursement rate.

09:56:17AM 7 The defendant does not address the key other  
09:56:19AM 8 provisions in the contract which require GEO to ascertain  
09:56:23AM 9 on a rolling basis what its legal requirements are, its  
09:56:29AM 10 state/local legal requirements, and comply with the most  
09:56:33AM 11 stringent standard.

09:56:34AM 12 In that respect, GEO is much more like the contractor  
09:56:38AM 13 in Campbell-Ewald versus Gomez, where the federal  
09:56:42AM 14 government said you have to make sure that you comply with  
09:56:46AM 15 the notification requirements before you attack somebody.  
09:56:48AM 16 It's like the contractor in Cunningham.

09:56:50AM 17 I think Salim is instructive here. In Salim the  
09:56:55AM 18 Eastern District of Washington reviewed claims of  
09:56:57AM 19 derivative sovereign immunity by contractors. It was key  
09:57:01AM 20 that those contractors had a discretionary role in  
09:57:04AM 21 formulating the way that the program worked. That  
09:57:07AM 22 destroyed Yearsley prong 1, which was the authorization.  
09:57:10AM 23 That discretion, that contractual delegation of authority  
09:57:13AM 24 to determine how it works, which we see in this  
09:57:17AM 25 declaration from ICE, the first time we have seen it, the

09:57:20AM 1 first time the court has seen it, that's the way GEO  
09:57:24AM 2 operates at the Northwest Detention Center.

09:57:26AM 3 And it begs the question, if GEO can pay two or three  
09:57:30AM 4 bucks at the south Texas facility, and the LaSalle  
09:57:33AM 5 detention facility, why can't it pay 11 here?

09:57:37AM 6 There is no legal impediment from Congress. That is  
09:57:41AM 7 black letter appropriations law. We cited it at Page 13  
09:57:45AM 8 of our response. And appropriators will tell you that the  
09:57:49AM 9 law is, an appropriations bill is valid for the period of  
09:57:54AM 10 the appropriation.

09:57:55AM 11 Now, there is an authorization for payment of  
09:57:57AM 12 detainees out of the lump sum allocation of money to DHS  
09:58:03AM 13 every year. That is an authorization, okay -- it's the  
09:58:05AM 14 authority that Congress has given ICE to pay.

09:58:08AM 15 But the appropriation is two parts. The  
09:58:12AM 16 appropriation does not specify a wage rate, and it has not  
09:58:17AM 17 since 1978. I think the court grasped that in its prior  
09:58:21AM 18 rulings.

09:58:21AM 19 In 1939 the Supreme Court said that the government  
09:58:24AM 20 does not become a conduit of its immunity in suits against  
09:58:29AM 21 its agents and instrumentalities merely because they do  
09:58:32AM 22 its work. That is the proposition that is before this  
09:58:37AM 23 court on GEO's motion to dismiss on Yearsley immunity.  
09:58:41AM 24 GEO is saying, "Because we have a contract with the  
09:58:43AM 25 government, ipso facto, they blessed everything we are

09:58:46AM 1 doing, they have authorized everything we are doing, and  
09:58:48AM 2 that's enough. We are immune." That is simply not the  
09:58:51AM 3 law.

09:58:52AM 4 OIG Document 18-67 was released June 26th, 2017.  
09:58:58AM 5 That is the Department of Homeland Security's Office of  
09:59:02AM 6 Inspector General. It is titled, "ICE's inspections and  
09:59:06AM 7 monitoring of detention facilities do not lead to  
09:59:09AM 8 sustained compliance or systemic improvements." The fact  
09:59:13AM 9 that the contract -- the fact that GEO continues to  
09:59:16AM 10 operate the facility does not equal ICE's authorization of  
09:59:20AM 11 everything it does there.

09:59:22AM 12 So we think that GEO's motion fails at prong 1. And  
09:59:27AM 13 we have discussed why at prong 2, ICE does not have the  
09:59:31AM 14 authority to set a rate. And you will look in vain for  
09:59:34AM 15 something in this declaration or the prior one that was  
09:59:37AM 16 filed by Ms. Valerio -- We found out last night she's  
09:59:42AM 17 actually serving as a paid consultant for GEO, and  
09:59:45AM 18 submitted the declaration in violation, apparently, of the  
09:59:48AM 19 agency's Touhy regulations, and I fear in violation of 41  
09:59:52AM 20 U.S.C. 2104(a)(3). You will look in vain for something  
09:59:56AM 21 that says, "Here is the delegation from Congress that says  
09:59:59AM 22 \$1 a day this year." The last time that happened was in  
10:00:02AM 23 1978.

10:00:03AM 24 This is an improper forum. This motion to dismiss is  
10:00:07AM 25 an improper forum to resolve these issues. These are fact

10:00:11AM 1 questions. I would love to depose Mr. Johnson. I would  
10:00:14AM 2 love to depose Ms. Valerio. We have not had an  
10:00:18AM 3 opportunity to do that yet. Ms. Valerio was subpoenaed,  
10:00:21AM 4 and her testimony was replaced by some other ICE  
10:00:26AM 5 officials. It was scheduled for Washington, D.C. We  
10:00:28AM 6 later found out that the government was going to move to  
10:00:30AM 7 quash those subpoenas. GEO issued them, and ICE was going  
10:00:33AM 8 to move to quash them. We have not had an opportunity to  
10:00:36AM 9 test these propositions through documented fact discovery.  
10:00:40AM 10 And we should.

10:00:40AM 11 If you look at the cases on which GEO relies, they  
10:00:44AM 12 are resolved on summary judgment, not a motion to dismiss  
10:00:48AM 13 pre-depositions, pre-paper discovery.

10:00:50AM 14 An instructive case that we discovered after reading  
10:00:53AM 15 GEO's reply is Anchorage versus Integrated Concepts and  
10:00:58AM 16 Research, Inc. That is Judge Gleason in the District of  
10:01:02AM 17 Alaska.

10:01:02AM 18 THE COURT: I'm sorry, Judge who?

10:01:07AM 19 MR. FREE: Judge Gleason. 1 F. Supp. 3d 1001.  
10:01:12AM 20 And we point the court to Page 1012, particularly to Note  
10:01:17AM 21 77.

10:01:18AM 22 Because this case is about derivative sovereign  
10:01:22AM 23 immunity, we think that the court should at least consider  
10:01:26AM 24 what courts have said about the nature of this defense, is  
10:01:30AM 25 it a jurisdictional defense, like actual sovereign

10:01:33AM 1 immunity, the immunity of the sovereign, or is it a merits  
10:01:37AM 2 defense? Is it a defense to liability? At Note 77 of  
10:01:42AM 3 this decision Judge Gleason analyzes that, and concludes  
10:01:44AM 4 it is the latter, it is a defense to liability, regardless  
10:01:47AM 5 of the nomenclature courts have used.

10:01:50AM 6 Judge Walton in the District of Columbia, In Re Fort  
10:01:54AM 7 Totten, 895 F.Supp. 2d 48 at Page 78, also discusses how  
10:02:00AM 8 this is not actually a jurisdictional defense; it is  
10:02:04AM 9 actually a liability defense.

10:02:05AM 10 And if you read Justice Ginsburg's opinion in  
10:02:08AM 11 Campbell-Ewald, the manner in which she disposes of the  
10:02:12AM 12 question, which is to take all inferences in a light most  
10:02:16AM 13 favored to the plaintiff, and avoid summary disposition,  
10:02:19AM 14 that is a summary judgment standard. She cites  
10:02:26AM 15 Matsushiba, I believe.

10:02:27AM 16 Again, that would not be the case if it were  
10:02:29AM 17 jurisdictional. The plaintiff would have the burden of  
10:02:32AM 18 proving jurisdiction, as it does in a 12(b)(1) factual  
10:02:35AM 19 attack. So we do not believe this is the proper forum to  
10:02:38AM 20 resolve these questions.

10:02:39AM 21 And with that, your Honor, unless you have any  
10:02:42AM 22 specific questions about Yearsley, I am going to hand it  
10:02:44AM 23 over to Mr. Whitehead to discuss the class certification.

10:02:47AM 24 THE COURT: I might ask you, and the defense may  
10:02:56AM 25 wish to respond to this -- if I can find my note. I

10:03:19AM 1 wondered about this in regard to the elements to prove  
10:03:24AM 2 Yearsley immunity. The first thing is that the government  
10:03:30AM 3 authorized the contractor's actions. Does that mean in  
10:03:38AM 4 this setting that the government has to, for Yearsley to  
10:03:44AM 5 apply, authorize a dollar a day, or does it mean the  
10:03:51AM 6 government has to authorize the contractor to ignore the  
10:04:00AM 7 state law?

10:04:01AM 8 MR. FREE: I think it is the latter, your Honor.

10:04:03AM 9 We would point the court to Meyers versus the United

10:04:06AM 10 States. That is a Ninth Circuit case from 1963. The cite

10:04:09AM 11 there is 323 F.2d 580, and it is at Page 583. The Ninth

10:04:18AM 12 Circuit looked at this authority prong and interpreted it

10:04:21AM 13 as, "in conformity with the terms of said contract."

10:04:26AM 14 So, in other words, it said the contractor is immune  
10:04:29AM 15 so long as it is in conformity with the terms of the  
10:04:32AM 16 contract. And once you fall out of conformity, you have  
10:04:37AM 17 exceeded the authorization of the government to pay.

10:04:41AM 18                   What we would contend in this case is that GEO is out  
10:04:44AM 19                   of conformity with the term of the contract that requires  
10:04:46AM 20                   it to continuously ascertain all applicable state and  
10:04:50AM 21                   local laws; and that by not applying the most stringent  
10:04:54AM 22                   law in the event of a conflict, specifically by not paying  
10:04:58AM 23                   minimum wage, it is acting outside the federal  
10:05:00AM 24                   government's authorization.

10:05:01AM 25 The court will look in vain for any paragraph in the

10:05:06AM 1 Johnson declaration filed this morning saying that ICE has  
10:05:11AM 2 authorized GEO to violate Washington's Minimum Wage Act.

10:05:17AM 3 It is not there.

10:05:18AM 4 If the court has no further questions, we will  
10:05:21AM 5 address the class cert.

10:05:35AM 6 MR. WHITEHEAD: Good morning, your Honor. GEO  
10:05:47AM 7 relies upon civil immigration detainees participating in  
10:05:53AM 8 the Voluntary Work Program to operate the Northwest  
10:05:58AM 9 Detention Center on the Tideflats.

10:06:00AM 10 As the court knows, these VWP workers are only  
10:06:04AM 11 compensated at the rate of \$1 a day. Looking at the  
10:06:07AM 12 economic realities of the situation, we argue that an  
10:06:10AM 13 employment relationship exists between GEO and the  
10:06:13AM 14 detainee workers at the Northwest Detention Center, and,  
10:06:18AM 15 further, that GEO violates the Washington Minimum Wage Act  
10:06:22AM 16 by paying these workers sub-minimum wages.

10:06:26AM 17 GEO obviously disagrees with our position. But when  
10:06:30AM 18 you look at the overarching questions in this case, they  
10:06:35AM 19 are common and predominate over any individualized  
10:06:38AM 20 questions. That being the case, the class vehicle is the  
10:06:42AM 21 best way, the superior means, by which to resolve the  
10:06:46AM 22 rights of hundreds of people, if not more, in one fell  
10:06:51AM 23 swoop. So for that reason, we look to certify a class.

10:06:54AM 24 Rather than hustling through every element of  
10:06:57AM 25 Rule 23(a) or 23(b)(3), I would like to quickly, in the

10:07:04AM 1 limited time that I have, address the remaining points,  
10:07:07AM 2 the first of which is that GEO practically admits that  
10:07:10AM 3 common questions abound and predominate.

10:07:13AM 4 We have heard in its first motion to dismiss, in the  
10:07:16AM 5 context of the class certification motions, that there is  
10:07:20AM 6 a threshold question, the question of whether or not work  
10:07:24AM 7 authorization somehow precludes class certification if  
10:07:29AM 8 there is a preemption issue. This is a rehash of GEO's  
10:07:35AM 9 first motion to dismiss. In other words, they are arguing  
10:07:37AM 10 the threshold question is, could an employment  
10:07:40AM 11 relationship exist between the parties?

10:07:42AM 12 The court has already answered this question in the  
10:07:44AM 13 context of the motion to dismiss, denying that motion.  
10:07:47AM 14 And since then, the Central District of California has  
10:07:51AM 15 revisited the issue and analyzed and found there is no  
10:07:54AM 16 IRCA preemption.

10:07:55AM 17 Setting aside the fact that GEO is wrong on the law,  
10:07:58AM 18 in the context of class certification, it simply does not  
10:08:02AM 19 matter in the sense that there is an overarching question  
10:08:05AM 20 that is common to the class that is capable of a common  
10:08:08AM 21 answer. In that way the threshold question they have  
10:08:11AM 22 identified supports and undergirds our contention that  
10:08:14AM 23 there is a common overarching question that is capable of  
10:08:18AM 24 a common answer in this case.

10:08:19AM 25 Not only that, once you get past what they have

10:08:22AM 1 identified as the threshold question of, could an  
10:08:25AM 2 employment relationship exist, you then delve into whether  
10:08:28AM 3 or not an employment relationship did in fact exist.

10:08:31AM 4 The Washington State Supreme Court has devised an  
10:08:35AM 5 economic reality test, which is a multifactorial test that  
10:08:39AM 6 looks at the nature of the relationship between the  
10:08:41AM 7 parties. So when you are looking at the nature of the  
10:08:43AM 8 relationship, you are asking yourself questions, for  
10:08:45AM 9 example, who, when, where, what, and why of GEO's  
10:08:50AM 10 authority. Who could participate in the volunteer work  
10:08:52AM 11 program? Could they direct where and when they worked?  
10:08:55AM 12 Did they control the means of the production? In this  
10:08:58AM 13 instance, did they give them training? Did they give them  
10:09:01AM 14 equipment? Did they set the pay rate of a dollar a day?  
10:09:04AM 15 Does GEO rely upon the labor of the detainee workers to  
10:09:09AM 16 support its operations? These are overarching questions  
10:09:11AM 17 that are capable of a common answer.

10:09:13AM 18 Now, GEO will point to the granular aspects of the  
10:09:17AM 19 daily tasks. They will say, "Well, the work that was  
10:09:20AM 20 performed by the person that cleaned the kitchen is  
10:09:22AM 21 different than the work that was performed by the person  
10:09:24AM 22 that cleaned the bathroom."

10:09:25AM 23 They will point to security assessments: "Well, this  
10:09:28AM 24 person is high risk, and therefore they are confined to  
10:09:30AM 25 their pod," versus, "This person is deemed as a lower

10:09:34AM 1 security risk and has more free-ranging ability throughout  
10:09:37AM 2 the facility."

10:09:38AM 3 At the end of the day, those are questions that do  
10:09:40AM 4 not impact the scope of GEO's authority or the scope of  
10:09:46AM 5 the economic relationship between the parties.

10:09:48AM 6 I mean, the relationship, however broad, however  
10:09:51AM 7 narrow, would be the same, irrespective of the tasks that  
10:09:55AM 8 are being performed on a daily basis.

10:09:58AM 9 The second point that I want to look at is the fact  
10:10:01AM 10 that individual questions about damages do not predominate  
10:10:07AM 11 over the common questions regarding liability. The cases  
10:10:12AM 12 are legion. We cite them in our brief. Courts find in a  
10:10:17AM 13 wage-and-hour context when there is a common scheme, and  
10:10:21AM 14 the fact that there is a common question capable of a  
10:10:24AM 15 common answer, the fact that there are individualized  
10:10:27AM 16 damage inquiries does not somehow defeat class  
10:10:30AM 17 certification. That is almost always going to be the case  
10:10:32AM 18 in a wage-and-hour case, in that there are going to be  
10:10:35AM 19 different damages apportioned to different class members.

10:10:37AM 20 The thing about a wage-and-hour case, of course, as  
10:10:39AM 21 the court well knows, those damages lend themselves to  
10:10:43AM 22 formulaic calculations. I mean, it is simply a matter of  
10:10:46AM 23 math in terms of figuring out what those damages are. So  
10:10:49AM 24 it does not necessarily defeat the overarching common  
10:10:52AM 25 question with respect to liability.

10:10:55AM 1           Not only that, as we point out in our briefing,  
10:10:59AM 2           representative data may be used, sampling may be used to  
10:11:03AM 3           help in the quest to calculate the actual damages.

10:11:06AM 4           The Supreme Court has endorsed this approach. In  
10:11:09AM 5           looking at *Tyson Food v. Bouaphakeo*, there is the notion  
10:11:13AM 6           that we can look to aggregate damages, meaning GEO's total  
10:11:18AM 7           liability, as a matter of math in figuring out what the  
10:11:21AM 8           total liability would be and then figuring out the  
10:11:23AM 9           proportionate share of damages for individual class  
10:11:26AM 10           members.

10:11:26AM 11           The last point that I would like to address is the  
10:11:28AM 12           adequacy of the plaintiff, Fernando Aguirre-Urbina. There  
10:11:36AM 13           has been a late -- I think it was titled as a supplemental  
10:11:39AM 14           authority, that was submitted to the court, regarding his  
10:11:42AM 15           medical records, and arguing from those records that he is  
10:11:45AM 16           somehow an inadequate class representative.

10:11:48AM 17           I think, first and foremost, GEO has waived these  
10:11:51AM 18           sort of arguments in that way, in that they did not  
10:11:53AM 19           address it in their motion to deny class certification,  
10:11:57AM 20           and did not address it squarely in their opposition to our  
10:11:59AM 21           motion to certify. So I think waiver has occurred in that  
10:12:02AM 22           way.

10:12:02AM 23           Even if the court were to consider their arguments,  
10:12:04AM 24           what was true in the past of Mr. Aguirre-Urbina is  
10:12:07AM 25           certainly not true today. We submitted in somewhat of,

10:12:10AM 1 perhaps, an unusual step of giving the court the entire  
10:12:13AM 2 transcript, as well as the video, so that you could see  
10:12:15AM 3 for yourself that he withstood seven hours of very pointed  
10:12:19AM 4 questions, at times very disdainful questioning, and  
10:12:23AM 5 performed admirably. The question of adequacy is one as  
10:12:26AM 6 to whether or not there is a conflict between the proposed  
10:12:29AM 7 class rep and the class, and whether or not that person  
10:12:31AM 8 will help in the prosecution of the case.

10:12:35AM 9 Mr. Aguirre-Urbina has done that ably in this matter.

10:12:38AM 10 Even to the extent -- assuming the court were to find  
10:12:43AM 11 somehow that he was inadequate as a class representative,  
10:12:46AM 12 well, he is one of two proposed class representatives. So  
10:12:49AM 13 that issue alone would not preclude class certification in  
10:12:52AM 14 this case.

10:12:53AM 15 In conclusion, what we are dealing with here, and you  
10:12:57AM 16 see this in the performance-based national detention  
10:13:01AM 17 standards, the contracts, and, frankly, from the argument  
10:13:04AM 18 this morning, that we are dealing with a common scheme.  
10:13:07AM 19 We are dealing with a common program as it relates to the  
10:13:11AM 20 VWP workers which GEO administers.

10:13:15AM 21 In that way, the class vehicle is well suited to  
10:13:20AM 22 resolve the rights of these folks. So in that way, we  
10:13:23AM 23 urge the court to certify a class. It would not be the  
10:13:27AM 24 first court to do so, in the sense that in the District of  
10:13:30AM 25 Colorado there was a class certified of detainee workers

10:13:33AM 1 which was recently upheld by the Tenth Circuit.

10:13:37AM 2 Unless there are any further questions from the  
10:13:38AM 3 court, I would conclude my remarks.

10:13:41AM 4 THE COURT: I may have some. Let's go ahead.

10:13:48AM 5 Defense counsel reserved some time. Excuse me. Did you  
10:14:04AM 6 get the citations that counsel referred to as we went  
10:14:09AM 7 along? Nathan Nanfelt is one of my law clerks. He is the  
10:14:16AM 8 brains of the operation here. I sometimes wonder if  
10:14:20AM 9 lawyers realize how much they are arguing to law clerks as  
10:14:25AM 10 well as the judge. Anyway, go ahead.

10:14:29AM 11 MR. EMERY: Your Honor, there is a daunting  
10:14:32AM 12 number of things to respond to here, but I think the first  
10:14:34AM 13 thing -- just one thing to revisit on Yearsley immunity  
10:14:39AM 14 is, again, to emphasize ICE pays the same amount at every  
10:14:45AM 15 facility. There is no reason to treat us different as a  
10:14:48AM 16 contractor. ICE funds the Voluntary Work Program because  
10:14:54AM 17 it is its program. It is a national program. If you read  
10:14:57AM 18 the declaration filed today, there is an emphasis  
10:15:00AM 19 throughout that they want uniformity.

10:15:03AM 20 All of the paper that is put in this case -- They  
10:15:06AM 21 come in and produce some, you know, blips here and there,  
10:15:12AM 22 something from other cases. Let's talk about this case.  
10:15:14AM 23 They have alleged we pay \$1 a day. That's what ICE tells  
10:15:18AM 24 us to do. That's what we are authorized to do.

10:15:20AM 25 The second thing is to turn to the issue of

10:15:24AM 1 employment. This is an important moment, because if the  
10:15:28AM 2 court allows these claims to go forward, and even  
10:15:32AM 3 considers them for class certification, it is turning its  
10:15:37AM 4 back on a considerable amount of agency experience and  
10:15:42AM 5 history. ICE has been operating detention facilities  
10:15:46AM 6 through contractors for decades. No state agency --  
10:15:50AM 7 nobody has ever come forward to GEO and suggested that it  
10:15:53AM 8 should be paying state-level minimum wages when Congress  
10:15:57AM 9 has expressly said what the rate is for payment, and ICE  
10:16:01AM 10 controls the money that goes to detainees.

10:16:05AM 11 I would point you in particular to the FLSA opinions,  
10:16:09AM 12 that have gone back for decades, that draw a very simple  
10:16:13AM 13 distinction: Are detainees entitled to minimum wage under  
10:16:19AM 14 the FLSA? No. Why? Because they are not employees.  
10:16:22AM 15 They work for purposes of institutional maintenance. They  
10:16:25AM 16 are not out seeking a wage to help support themselves.

10:16:27AM 17 When the detainees are in a facility they are  
10:16:30AM 18 supported, they have clothing, they have healthcare, they  
10:16:33AM 19 have food. They are not the particular wage earner, and  
10:16:36AM 20 they are not the recipient of the largess of state minimum  
10:16:39AM 21 wage laws.

10:16:40AM 22 There is nothing in our contract that suggests that  
10:16:43AM 23 ICE ever intended us to subject -- to have our detention  
10:16:48AM 24 facilities and the VWPs run by the various different state  
10:16:53AM 25 laws where ICE has facilities.

10:16:55AM 1       This is the same rationale that the --

10:16:57AM 2       THE COURT: If that's the case, why is that

10:16:59AM 3 provision in the contract regarding state and local laws?

10:17:07AM 4       MR. EMERY: Because there are a number of state

10:17:09AM 5 laws that we are required to -- For example, there are

10:17:13AM 6 different federal laws. The VWP complies with OSHA, with

10:17:18AM 7 state labor laws. That has been expressed. There is

10:17:21AM 8 definitely room for that. It doesn't mean that no state

10:17:24AM 9 laws are relevant.

10:17:26AM 10       But on an issue on which Congress has expressly

10:17:29AM 11 spoken, expressly set a rate, now and hereafter there is

10:17:34AM 12 no -- there is simply no plausible understanding that ICE

10:17:37AM 13 intended for state minimum wage laws everywhere it has

10:17:41AM 14 facilities to set what that rate is.

10:17:44AM 15       I mean, if ICE had intended state minimum wages,

10:17:49AM 16 which are at least 11, \$12 an hour, how does that make

10:17:53AM 17 sense with the at least \$1 per day provision? Why would

10:17:57AM 18 ICE have that provision, use that language, if it intended

10:18:00AM 19 the state minimum wage laws would work at any given state?

10:18:07AM 20       There has been talk in the briefing and today about

10:18:12AM 21 the economic reality test. Your Honor, there is only one

10:18:15AM 22 economic reality that matters here. If Mr. Nwauzor,

10:18:19AM 23 Mr. Aguirre, Mr. Chen, and likely just about anybody in

10:18:24AM 24 their class, had come to GEO while they were detained and

10:18:28AM 25 asked to become a GEO employee, they would have said, "No

10:18:30AM 1 chance to do so." Why? Because they were forbidden by  
10:18:35AM 2 federal law from doing so by their detention status. They  
10:18:37AM 3 either had criminal convictions, which would have  
10:18:40AM 4 prohibited --

10:18:40AM 5 THE COURT: What if GEO is in fact, under an  
10:18:43AM 6 economic reality test, employing these people? The law is  
10:18:50AM 7 against the employer from employing people that are not  
10:18:53AM 8 employable. It doesn't prevent any illegal immigrant from  
10:19:00AM 9 working.

10:19:01AM 10 MR. EMERY: I understand your Honor's position on  
10:19:03AM 11 that. What really is the reality --

10:19:05AM 12 THE COURT: It is not my position. It is a  
10:19:07AM 13 question.

10:19:07AM 14 MR. EMERY: Okay. I understand the question.  
10:19:09AM 15 What is the reality of saying that we treated them like  
10:19:12AM 16 employees? We absolutely did not treat them as employees.

10:19:16AM 17 Do you know what our employees need to do to pass a  
10:19:19AM 18 background check? Do you know the expectations of them to  
10:19:22AM 19 be able to -- Our employees, we can tell them what to do,  
10:19:25AM 20 when to show up for work, what to do.

10:19:28AM 21 Think of the typical detainee. ICE tells them when  
10:19:31AM 22 to come to the facility, ICE says when they leave, ICE  
10:19:35AM 23 says what classification level they can work at, which  
10:19:37AM 24 drastically restricts the jobs they work. ICE even  
10:19:41AM 25 decides on a shift-by-shift basis who can actually work in

10:19:44AM 1 the program.

10:19:45AM 2 This is going back to Page 82 of the contract, where  
10:19:49AM 3 we were before. I would direct you to the very bottom  
10:19:53AM 4 paragraph on this page. It says, "It will be the sole  
10:19:58AM 5 responsibility of ICE to determine whether a detainee will  
10:20:03AM 6 be allowed to perform on voluntary work details and at  
10:20:06AM 7 what classification level." "The sole responsibility of  
10:20:11AM 8 ICE."

10:20:15AM 9 Mr. Kimble's declaration explains how this process  
10:20:18AM 10 works. There are kites that are put out, GEO puts  
10:20:21AM 11 together a list which is approved by ICE. ICE can take  
10:20:24AM 12 any single person off this list they want. How on earth  
10:20:28AM 13 is it the economic reality that GEO is the employer of any  
10:20:31AM 14 of these detainees? They are in federal immigration  
10:20:37AM 15 detention. They are in the federal government's custody.  
10:20:39AM 16 The federal government says what is done to them.

10:20:42AM 17 The very last thing, quickly, is class certification.  
10:20:45AM 18 Your Honor, the main thing I want to say here is we know  
10:20:47AM 19 so little about these claims. We know so little about  
10:20:50AM 20 them. You saw them rattle off, "Oh, we are going to do a  
10:20:53AM 21 model of this, we are going to do a model of that." The  
10:20:56AM 22 first gauntlet that any class member would have to do is  
10:20:59AM 23 to show that they are authorized to work for us when they  
10:21:02AM 24 are at --

10:21:02AM 25 THE COURT: Wait a minute. Wait a minute. Why

10:21:05AM 1 do they have to show that they are authorized to work when  
10:21:08AM 2 in fact they are working?

10:21:12AM 3 MR. EMERY: They are not. They are voluntarily  
10:21:15AM 4 participating in the Voluntary Work Program. GEO knows  
10:21:19AM 5 who works for them, because they pass all of our  
10:21:21AM 6 employment verification tests. None of these detainees  
10:21:25AM 7 did. They performed work as the government said that they  
10:21:27AM 8 could volunteer to do for a pay rate the government said  
10:21:31AM 9 they could do.

10:21:32AM 10 If there is going to be a class, it is going to have  
10:21:35AM 11 to be a class of people who actually were authorized to be  
10:21:38AM 12 our employees. None of these folks were. None of the  
10:21:40AM 13 named plaintiffs so far have met that. And they haven't  
10:21:45AM 14 pointed to a single class member --

10:21:57AM 15 THE COURT: There are examples all over the  
10:21:59AM 16 country of illegal immigrants who get work. And because  
10:22:10AM 17 they are illegal, their employers pay them less than  
10:22:15AM 18 minimum wage, because they think they can't complain.  
10:22:22AM 19 There are instances where -- we see cases where people in  
10:22:31AM 20 fact come into the country and are effectively enslaved  
10:22:37AM 21 and required to work without pay. The Minimum Wage Act is  
10:22:44AM 22 designed to protect the workers from being abused by  
10:22:52AM 23 employers. Employers are the ones that are restricted  
10:22:59AM 24 from hiring people that aren't qualified to work in the  
10:23:03AM 25 country. But the workers are not so limited.

10:23:13AM 1 I guess what I'm leading up to is this: Isn't this  
10:23:17AM 2 all a jury question? You guys asked for a jury, to my  
10:23:21AM 3 great relief. Isn't it a jury question as to what the  
10:23:27AM 4 employment relationship, if any, was, and how these  
10:23:36AM 5 various contract provisions and legal provisions should be  
10:23:41AM 6 applied?

10:23:44AM 7 MR. EMERY: It absolutely is not. Your Honor, I  
10:23:46AM 8 appreciate the concern. I recognize that that is the  
10:23:49AM 9 objective of a lot of state minimum wage laws. The folks  
10:23:54AM 10 in the unfortunate position you are talking about are not  
10:23:57AM 11 supported with food, and clothing, and healthcare, and  
10:24:00AM 12 medical care at U.S. taxpayer expense.

10:24:04AM 13 THE COURT: Some of them get various benefits  
10:24:06AM 14 from their employers.

10:24:08AM 15 MR. EMERY: They may. The Salas case is actually  
10:24:12AM 16 quite a good case on this point, your Honor. Salas says  
10:24:15AM 17 you may have to pay back -- an employer might have to pay  
10:24:20AM 18 backpay if they sort of willfully ignore the detention  
10:24:23AM 19 status of the detainee and employ them. Once it is  
10:24:27AM 20 determined that they are unlawfully working, there is no  
10:24:30AM 21 more obligation to pay backpay.

10:24:33AM 22 We know from the day they step into our facility they  
10:24:36AM 23 are not employees. There is no work authorization, and  
10:24:39AM 24 therefore no state minimum wage laws are going to apply.

10:24:44AM 25 We are in a different universe here. The detainees

10:24:49AM 1 aren't here because they are being exploited. The  
10:24:51AM 2 detainees are here because they are in the federal  
10:24:54AM 3 government's custody. If that's what the root issue is,  
10:24:57AM 4 there is a complaint about their custody itself, and the  
10:25:00AM 5 fact that they are in a federal detention facility, this  
10:25:03AM 6 is entirely the wrong case. That's an action that should  
10:25:06AM 7 be brought directly against the U.S. government, and not  
10:25:08AM 8 its federal contractor. It is another reason why Yearsley  
10:25:16AM 9 applies to us.

10:25:17AM 10 THE COURT: Thank you. Let me see if I have any  
10:25:19AM 11 other questions I want to put to you. I had a list of  
10:25:24AM 12 things.

10:25:32AM 13 MR. EMERY: Should I sit down or stay up?

10:25:35AM 14 THE COURT: Suit yourself, as long as you speak  
10:25:39AM 15 into the mic when you talk to me. I guess the only  
10:26:38AM 16 question I have is the process for authoring policies  
10:26:53AM 17 listed in the detainee handbook. Can somebody fill me in  
10:27:05AM 18 on that, what the process is?

10:27:08AM 19 MS. MELL: Your Honor, the position of GEO is  
10:27:11AM 20 that the oversight on the PBNDS standards by Congress  
10:27:18AM 21 requiring routine updates as to its implementation of  
10:27:24AM 22 PBNDS standards have set a Congressional level of  
10:27:28AM 23 authority to enforce those regulations.

10:27:31AM 24 THE COURT: I think you misunderstand my  
10:27:34AM 25 question. I am talking about the process for preparing

10:27:40AM 1 the detainee handbook and the policies that are in the  
10:27:46AM 2 handbook.

10:27:46AM 3 MS. MELL: From GEO's perspective?

10:27:49AM 4 THE COURT: No. No. Not from somebody's  
10:27:52AM 5 perspective. What is the process?

10:27:54AM 6 MS. MELL: I am asking whether you are inquiring  
10:27:56AM 7 of the PBNDS standards or GEO's standards?

10:28:01AM 8 THE COURT: You see, let me explain what I am  
10:28:05AM 9 talking about. We have all this reference to not less  
10:28:10AM 10 than a dollar a day, and then in the handbook it says \$1 a  
10:28:16AM 11 day. It is not not less than. It says \$1 a day is what  
10:28:19AM 12 they will be paid. My question is, what is the process to  
10:28:25AM 13 get from the standards and the contract over to the policy  
10:28:34AM 14 as stated in the handbook?

10:28:36AM 15 MS. MELL: Your Honor, there are two separate  
10:28:38AM 16 handbooks. I just want to be clear. When the detainee  
10:28:41AM 17 comes into the facility, they get the ICE national  
10:28:45AM 18 detention standard detainee handbook. That says for those  
10:28:49AM 19 detainees who have been participating within the requisite  
10:28:54AM 20 period that we are talking about here shall receive \$1 a  
10:28:57AM 21 day.

10:28:58AM 22 GEO, the detention facility, promulgates a second  
10:29:02AM 23 detainee handbook that mirrors what is in the ICE  
10:29:09AM 24 handbook. They just duplicate it. And then those are  
10:29:13AM 25 both available in dual languages and disseminated to the

10:29:17AM 1 detainees at the facility.

10:29:19AM 2 So in terms of how it happens, GEO relies on the  
10:29:23AM 3 detainee handbook that is provided by ICE.

10:29:29AM 4 MR. FREE: Paragraph 8 of the ICE declaration  
10:29:31AM 5 filed this morning essentially says, on Page 3 of the  
10:29:43AM 6 declaration, that the performance-based contracts, like  
10:29:48AM 7 the one at Tideflats, don't designate how a contractor  
10:29:52AM 8 performs the work, i.e., from the facility, but rather  
10:29:55AM 9 establishes the expected outcomes and the results.

10:29:58AM 10 The national detainee handbook has never gone through  
10:30:01AM 11 any sort of Congressional oversight. It is not  
10:30:06AM 12 incorporated into the contract. The PBNDS is incorporated  
10:30:11AM 13 into the contract, that says at least \$1 a day. The  
10:30:14AM 14 national detainee handbook, to the extent it says "shall,"  
10:30:17AM 15 is in conflict. But ICE says it's GEO. If you look at  
10:30:21AM 16 the contract, the contractor -- the very first line of the  
10:30:24AM 17 Voluntary Work Program section, the contractor is to  
10:30:31AM 18 develop the work plan.

10:30:33AM 19 MS. MELL: Your Honor, I just want to point out  
10:30:35AM 20 on this specific issue that ICE actually approves the  
10:30:38AM 21 Northwest Detention Center's version of its detainee  
10:30:41AM 22 handbook. It is reflected on the exhibit itself.

10:30:44AM 23 THE COURT: Okay. Thank you. As I indicated, we  
10:30:49AM 24 have already done a lot of work on this. With all these  
10:30:59AM 25 issues raised, as I indicated, it is partly a question of

10:31:04AM 1 what is the law that I should apply now and what are jury  
10:31:15AM 2 questions that come later. That's part of the analysis we  
10:31:21AM 3 have to deal with, I think, in coming to conclusions on  
10:31:24AM 4 these motions.

10:31:27AM 5 I also wanted to say I am aware on the motion to  
10:31:34AM 6 deny -- on the motion to dismiss the amended complaint  
10:31:43AM 7 there are some issues that are revisited from the original  
10:31:46AM 8 motion to dismiss. We have revisited those, even though  
10:31:53AM 9 there is a question raised about whether they are properly  
10:31:57AM 10 before the court. I felt I ought to look at them anew  
10:32:02AM 11 anyway, which we have done. So that will be reflected in  
10:32:08AM 12 the order we will issue.

10:32:10AM 13 Thank you very much. A lot of the same old, same old  
10:32:20AM 14 stuff going on here. We will try and do an appropriate  
10:32:26AM 15 analysis.

10:32:26AM 16 Do you have something further, Ms. Mell?

10:32:28AM 17 MS. MELL: Your Honor, I just was concerned that  
10:32:31AM 18 there was at least some oral presentation by the  
10:32:33AM 19 opposition as to the Tracey Valerio declaration. And it  
10:32:37AM 20 is GEO's position that ICE has not instructed us to  
10:32:39AM 21 withdraw the declaration, that the Touhy issue in play is  
10:32:44AM 22 the application of 5 CFR 2635.805, which says that experts  
10:32:51AM 23 like Tracey Valerio can testify as long as they are not  
10:32:57AM 24 testifying in a case where it is a party. To the extent  
10:33:01AM 25 we need to brief it --

10:33:01AM 1                   THE COURT: Ms. Mell, I read her declaration, and  
10:33:08AM 2                   saw who she is and where she came from, and the contents  
10:33:12AM 3                   of her declaration. I didn't think it made a whole lot of  
10:33:16AM 4                   difference in anything. The same thing is true of the  
10:33:23AM 5                   later ICE declaration, it just didn't add a lot to the  
10:33:30AM 6                   issues I have to decide.

10:33:34AM 7                   MS. MELL: Thank you, your Honor.

10:33:35AM 8                   THE COURT: What you do about it, whose fault  
10:33:38AM 9                   that was, who turned ICE on about that is not my concern.

10:33:47AM 10                  MS. MELL: Thank you, your Honor.

10:33:49AM 11                  THE COURT: Okay. Thank you.

12                                (Proceedings adjourned.)

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**C E R T I F I C A T E**

I, Barry Fanning, Official Court Reporter for the  
United States District Court, Western District of  
Washington, certify that the foregoing is a true and  
correct transcript from the record of proceedings in the  
above-entitled matter.

/s/ Barry Fanning  
Barry Fanning, Court Reporter